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In the Supreme Court of the United States

SAN DIEGO ASSOCIATION OF REALTORS® et al.,

Petitioners,

vs.

ARLEEN FREEMAN AND JAMES ALEXANDER,

Respondents.

On Petition for Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE, AND BRIEF OF AMICUS CURIAE National Association of REALTORS® IN SUPPORT OF PETITIONERS

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MOTION OF NATIONAL ASSOCIATION OF REALTORS® FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE*, IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

The National Association of REALTORS® (hereinafter NAR) respectfully moves this Court for leave to file a brief as *amicus curiae* in support of the Petition in this case.

Pursuant to Rule 37.2 of the Rules of this Court, NAR sought written permission of all parties to the filing of a brief as *amicus curiae*. Petitioners consented but Respondents declined to do so. Counsel to Petitioners orally requested, on behalf of NAR and other potential amici, such permission from David Barry, counsel to Respondents. Mr. Barry advised that Respondents denied the request. Accordingly, NAR must file this motion with the Court.

NAR submits that there are compelling reasons for the Court to grant this motion. As described in NAR's statement of identity and interest in the attached proposed *amicus curiae* brief, NAR is a national real estate trade association whose membership is comprised of local Realtor® associations and individuals directly impacted by the ruling below. NAR's concern for this case arises out of the substantial adverse impact the Ninth Circuit's ruling will have on the ability of NAR's 1600 constituent local Realtor® associations to fully and effectively serve their members, and, correspondingly, on the ability of those associations to equip their members to best serve the public.

NAR's proposed *amicus* brief does not replicate the arguments persuasively advanced in the Petition. Rather, NAR's brief explains how the Ninth Circuit's holding to apply *per se* antitrust analysis to a joint venture of local Realtor® associations is certain to have a pervasive and significant dampening effect on the willingness of such

associations to undertake joint ventures and other collaborative enterprises to serve their members.

Accordingly, NAR moves this Court for leave to file the attached proposed brief as *amicus curiae* in support of Petitioners.

Respectfully submitted,

/s/ Laurene K. Janik
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BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF REALTORS® IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Pursuant to Rule 37.2 of the Rules of this Court, the National Asscciation of REALTORS® (hereinafter NAR) submits this brief in support of the Petitioners.

IDENTITY AND INTEREST OF *AMICUS CURIAE*[1]

NAR is a non-profit professional association incorporated in Illinois and representing persons engaged nationwide in all phases of the real estate business, including brokerage, appraising, management, and counseling. Founded in 1908, NAR is well known to be a champion of the interests of real estate professionals and real property owners throughout the United States. NAR's membership includes 54 State Associations of REALTORS®, nearly 1600 state and local member Associations of REALTORS®, and approximately 951,000 REALTOR®[2] and REALTOR-ASSOCIATE® members.

NAR was created to promote and encourage the highest and best use of the land, to protect and promote private ownership of real property, and to promote professional competence among real estate practitioners. In pursuit of these objectives, NAR engages in a wide range of activi-

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[1] The Petitioner has consented to the filing of this brief. The letter of consent has been filed with the Clerk of the U.S. Supreme Court. Counsel for a party did not author this brief in whole or in part. No person or entity other than the *amicus curiae* made a monetary contribution to the preparation and submission of this brief.

[2] "REALTOR®" is a federally registered collective membership mark used by members of the NATIONAL ASSOCIATION OF REALTORS® to indicate their membership status.

ties, including development and distribution of professional education programs, promotion of equal opportunity in housing; enhancing a high level of professionalism in real estate practice by promulgating a Code of Ethics and insuring enforcement thereof, developing sound multiple listing service policies and practices to be employed by local associations, and creating programs to enhance cultural diversity among members and the clients and customers of members. NAR members agree as a condition of membership to adhere to the strict Realtors® Code of Ethics, to ensure their professionalism and competence.

Local Realtor® associations offer a wide variety of programs, services and products to their members designed to assist real estate professionals in their business activities and the services they offer to the public. These programs and services include multiple listing services, such as that operated by Petitioner Sandicor; professional education programs; government affairs programs to inform legislators and regulators about real estate issues and to advocate legislation and regulation beneficial to the industry and owners of real estate; professional standards activities and procedures, by which members are educated about the Realtors® Code of Ethics and alleged violations of the Code are adjudicated; tribunals to arbitrate, rather than litigate in the local courts, real estate-related disputes between members; and real estate related products, such as form listing and sale agreements, business and office supplies such as real estate signs, and educational publications and texts.

NAR's concern for this case arises out of the substantial adverse impact the Ninth Circuit's ruling will have on the ability of NAR's 1600 constituent local Realtor® associations to fully and effectively serve their members, and, correspondingly, on the ability of those associations to equip their members to best serve the public. Because NAR is

often called upon to assist in advising local Realtor® associations and their counsel regarding the formation of various joint ventures and other collaborative activities, NAR also is in need of this Court's guidance regarding the proper antitrust analysis applicable to such enterprises.

SUMMARY OF ARGUMENT

Local Realtor® associations provide many valuable and pro-competitive benefits to their members. Association members are consumers of the services offered by local Realtor® associations, and just as 21st century consumers of products sold by commercial retailers have come to have heightened expectations of high quality at low cost, members of Realtor® associations have likewise developed increasingly demanding expectations for the programs and services provided by their associations. Realtor® associations also are highly motivated to offer high quality products and services because they compete with other associations to attract real estate practitioners to become members and to purchase the products and services the associations offer.

To satisfy the rising expectations and demands of their members and to attract other practitioners to join or purchase association services, many Realtor® associations have begun to more vigorously pursue creative approaches to increase the quality and lower the cost—and price—of their programs, products and services. One important way many have sought to achieve this result is to collaborate with other Realtor® associations to jointly offer programs, products and services that none acting individually could offer, or to offer them at a price or on other terms than none could alone provide.

The MLS challenged by plaintiffs in this case, Sandicor, is but one example of such a collaborative enterprise,

formed to provide a previously unavailable type (or level) of service to members of the participating associations. The holding of the Ninth Circuit, however, condemns this service as incorporating an unlawful price fixing conspiracy, employing the familiar but unforgiving *per se* antitrust analysis. The effect of this holding will undoubtedly be to discourage local Realtor® associations from pursuing innovative efforts to combine their resources and talents to offer new or enhanced products or services to their members. It will stifle local associations from joining together to serve their members in better and unique ways. The fear of litigation that this holding threatens will cause association volunteers, professional staff, and even counsel to be reluctant if not wholly unwilling to risk personal liability by engaging in the development and implementation of programs by which associations might work together to jointly serve their members. And it will serve as a basis for plaintiffs to assert and courts to rule that a product or service offered by a joint venture of associations is unlawful *per se* simply because it incorporates an agreement among participating associations that is an inherent aspect of the joint venture, instead of subjecting that agreement and the joint venture of which it is a part to specific analysis of whether its formation and operation has pro-competitive benefits that outweigh any restrictive aspects of the respective associations' participation in the enterprise.

Thus, NAR urges this Court to grant the Petition to review the applicability of the *per se* rule to efficiency-enhancing joint ventures among Realtor® associations and other associations and enterprises engaged in such collaborative activities.

ARGUMENT

NAR adopts and endorses the Petitioners' Statement of the Case and the reasons offered by Petitioners why this case merits review by this Court and correction of the Ninth Circuit's erroneous conclusions of law. NAR offers this brief to separately explain to the Court why the holding of the Ninth Circuit will have a substantial adverse affect on local associations of Realtors® across the country, as well as associations serving members in many other fields.

1. Realtor® Associations Provide Considerable Pro-Competitive Benefits to Their Members, and Their Ability to Do So is Enhanced By Collaboration Among Associations. The entire Realtor® organization has closely monitored this case during it's long tenure because of the obvious potential impact on the operation of an important member service—a multiple listing service ("MLS") formed and operated jointly by group of local Realtor® associations.[3] The Ninth Circuit's holding that antitrust claims directed at joint ventures or other collaborative efforts of several Realtor® associations should be analyzed under the *per se* rule has considerably broader implications of equal or even greater concern to local Realtor® associations.

Trade associations like NAR and its constituent local and state associations, like all trade groups, are established

[3] Presently there are approximately 94 regional MLS's of significant size established and operated by two or more local Realtor® associations, and over 700 MLS's created and operated by a single association. For many of the same reasons described in the Petition and the Ninth Circuit's opinion, there continues to be a clear trend for MLS's operated by a single association to consolidate with others to form a regional MLS.

for the very purpose of improving industry conditions[4] and providing valuable services to their members. Some programs and services offered by associations are intended to advance the business prospects of their members by shaping the legal and business environment in ways that will allow the members' businesses to flourish. Other association activities offer services, facilities or functions which members can use in conducting business affairs. Often these services consist of enterprises that cannot readily be established by a single member acting alone. The MLS is just such a facility, providing participants with a highly efficient and readily available opportunity to cooperate with many competing real estate agents in the sale of real estate. Other common association activities—education programs, conventions and meetings, government affairs and other legislative efforts, promulgation and enforcement of ethical and professional standards, preparation and distribution of valuable business forms and publications, and others, are all enormously beneficial and pro-competitive, because they enhance the business competence and capabilities of all participating members. Realtor® organizations engage in all these activities and more in service to their members.

Just as individuals and real estate companies come together to form associations for their common benefit, associations also combine resources and efforts to produce programs and services that will better serve their respective members, or serve the members in ways that individual associations are unable to do. Moreover, in the same way that many commercial enterprises have faced increasing demands from their customers in recent years, the "customers" of Realtor® association programs and services—that is, members of Realtor® associations—have developed increasingly higher and higher expectations for the scope, nature and quality of the services delivered

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[4] See, e.g., I.R.C. §501(c)(6) and Treas. Reg. §1.501(c)(6)-1.

by their local Realtor® associations. Simply put, they expect and demand more value for their association dues dollars. These member expectations put pressure on associations to do more for their members with less, and to be increasingly accountable to their members to use dues-supported financial and other resources as fully, effectively and efficiently as possible.

In response to these pressures and demands from their members, and encouraged by NAR, local Realtor® associations have increasingly sought to collaborate with each other to offer jointly various programs and services. The resulting collaboration among Realtor® associations benefits members by making available not only higher quality or lower cost programs and services, but in many cases by making possible products and services that no association acting alone could offer at all. These collaborative efforts of associations thereby result in significant pro-competitive effects by enhancing the quality as well as the scope of the pro-competitive services the associations provide to their members.

2. Local Realtor® Associations Cooperate In Many Ways to Jointly Offer More and Better Services to Their Members. An obvious example of collaboration among Realtor® associations is, of course, a regional MLS like Sandicor, the MLS created jointly by Petitioners to offer countywide MLS services to their members. In addition to operating MLS's, though, Realtor® associations engage in a myriad of agreements, joint ventures and other cooperative efforts to expand or improve services provided to their members. Associations frequently join together, for example, to offer professional education programs so that they can collectively present higher quality programs, or simply a larger number of programs, than could a single association.

Associations also collaborate to offer lock-box systems[5], particularly since such systems often require substantial capital investment to acquire the lock boxes sold or leased to members and the computer and other hardware and software necessary to operate such a system. Other examples include associations cooperating to collectively produce publications, to own, lease or operate office or meeting facilities, to conduct conventions and conferences, to acquire and use expensive computer capabilities for membership databases and other association records management functions, and even to jointly hire and employ staff, consultants and others necessary to perform various functions essential to association operations, including executive management, accounting services, legal counsel and other advocacy and information services.

Programs and services established and offered collectively by several associations require discussion, negotiation and agreement regarding the terms and conditions on which the various services will be offered, the respective contributions of each association to the joint venture, and the rights and duties of each association and its

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[5] A lock box is a secure box affixed temporarily but irremovably to a home being offered for sale. Each real estate agent participating in the lock box system obtains a number of such boxes and a master key that opens all the boxes in the system. A box placed on a home contains a door key for the home on which the box is located. This system allows any participant the ability to access the home to show it to interested buyers without having to first visit the listing broker's office to secure a key. Many modern lock box systems use electronic key facilities which not only open the box in which the house key is located, but also record a unique code which allows the listing broker marketing the property to identify all other real estate agents who have accessed the box to show the property. By facilitating the ability of agents to show property to prospective purchasers, lock box systems provide a significant and pro-competitive benefit to participating real estate brokers and agents.

members to enjoy the benefits of the product or service provided. For example, associations cooperate to jointly offer to their members education programs that neither could offer alone, or in which neither would risk investing the necessary time and human and financial resources for fear that such a program would not be of interest to a sufficient number of members. The responsibility for marketing the program to members is often shared among all participating associations, with the associations agreeing that a portion of the course registration fees collected be paid to each association to offset a portion of their contribution to sponsoring and marketing the course. A number of Realtor® associations have also combined resources to establish a lock box system, with each offsetting their respective share of the costs to acquire and operate the system by marketing the sale or lease of lock boxes to their own members.

In such cases the participating associations may seek, or even demand, compensation from the joint venture in return for their respective contributions to the creation and operation of the program or service. For example, associations jointly offering and marketing a lock box system might agree on a fee to be paid to each by the joint venture for their respective marketing efforts. Agreement regarding the amount of such compensation may be necessary to persuade the associations to participate in the joint venture at all. In other cases participating associations may be induced to participate in joint ventures only upon agreement among the associations regarding some other aspect of delivery of the service. For example, several associations might be induced to offer a joint education program only where the associations each retain the exclusive right to market and sell the program to their own members, and to be compensated at a prescribed rate for doing so.

3. This Litigation Vividly Demonstrates That the Ninth Circuit's Holding Will Deter Formation of Beneficial Collaborative Relationships Among Local Realtor® Associations. Perhaps the most poignant example of the ominous impact that application of the *per se* rule will have on local Realtor® associations joining together to form joint enterprises to serve their members more effectively is the present litigation. Petitioners—the local Realtor® associations that own and operate Sandicor, as well as Sandicor itself—have, of course, experienced the financially and emotionally destructive force of this litigation. Unwitting victims of this case are also those employees of Petitioners who were previously parties to the case, and even more unfortunately, the *unpaid, volunteer* directors and officers of Petitioners who were likewise party defendants for much of this litigation. The latter individuals are real estate professionals who, in addition to conducting their (usually full-time) professional business activities as real estate brokers and agents, freely offered countless uncompensated hours and tireless efforts in service to the defendant associations, and thus to their fellow real estate professionals. Their vision brought about Sandicor, which even Respondents concede substantially enhances the MLS service enjoyed by thousands of San Diego area real estate brokers and agents, advances competition among those brokers and agents, and well-serves real estate buyers and sellers. For their trouble, they were subjected to the extraordinary personal stress and expense of this litigation. It takes little imagination to foresee that future volunteer officers and directors of Realtor® associations will, under the Ninth Circuit's ruling, be unlikely to expose themselves to similar travails of litigation and potential liability under the antitrust laws by participating in the development of efficiency-enhancing collaborations among the Realtor® associations they serve.

4. Because the Ninth Circuit's Holding Will Significantly Inhibit Associations from Joint Venturing to Better Serve Their Members, this Court Should Grant Review to Declare That the *Per Se* Rule Does Not Apply to Agreements Necessary to Collaborative Activities. The Ninth Circuit's holding will have a profound impact on the willingness of local Realtor® associations, indeed on any group of professional associations, to continue to seek ways to join together to form joint ventures and other collaborative efforts to improve or expand services to their members. Prior to the Ninth Circuit's decision, local Realtor® associations, and NAR when called upon to advise them, could assess the antitrust implications of such joint enterprises by consultation and reliance on not only the decisions of the First and Seventh Circuits[6], but also on the guidance offered by the United States Department of Justice and the Federal Trade Commission in their jointly issued Collaboration Guidelines[7]. That guidance advises that "where participants in an efficiency-enhancing integration of economic activity enter into an agreement that is reasonably related to the integration and reasonably necessary to achieve its pro-competitive benefits, the Agencies analyze the agreement under the rule of reason, even if it is of a type that might otherwise be considered illegal *per se*."[8] In light of the Ninth Circuit's ruling, however, the vitality of such guidance is seriously compromised, and NAR seeks clarification from this Court.

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[6] *Augusta News Co. v. Hudson News Co.*, 269 F.3d 41 (1st Cir. 2001); *Addamax Corp. v. Open Software Found., Inc.*, 152 F.3d 48 (1st Cir. 1998); *Polk Bros., Inc. v. Forest City Enterprises, Inc.*, 776 F.2d 185 (7th Cir. 1985); *Chicago Professional Sports Limited Partnership v. National Basketball Ass'n*, 95 F.3d 593 (7th Cir. 1996).

[7] Fed. Trade Comm'n & Dept. of Justice, *Antitrust Guidelines For Collaborations Among Competitors* 1 (Apr. 2000).

[8] Guidelines §3.2, at 8.

Absent review by this Court to consider the Ninth Circuit's conclusion that the *per se* test is applicable to agreements among associations that are a necessary component of such joint enterprises, associations can no longer confidently implement joint ventures based on the advice of counsel and economic advisors that the proposed collaboration has significant pro-competitive effects that outweigh the anticompetitive limitations inherent in implementing it. Such pro-competitive impact is irrelevant under the Ninth Circuit's holding, although it would insulate the associations from antitrust liability under the rule of reason. The threat of antitrust liability under the inflexible *per se* standard will likely make local Realtor® associations and their leaders reticent to even discuss proposals for beneficial cooperative relationships where it may be necessary for the associations to agree on an particular aspect of association participation in implementing the service. And NAR and its leaders will be compelled to discourage, rather than encourage, creativity among local association leaders to develop innovative member services and programs requiring collaborative conduct among a number of associations, thereby depriving members of the opportunity to benefit from and enjoy such services. Another result may be the demise of some associations who, lacking the opportunity to collaborate with other associations to offer a full complement of useful member services and programs, may be unable to attract and retain members.

To be sure, several real estate associations could combine to devise a scheme to jointly offer a single program or service that does little more than replicate essentially identical ones offered individually by each association, where no integration of the respective associations' assets is necessary to implement the service and no new or added value is offered by it. Such agreements, whose essential purpose and function is to raise or stabilize the price for the

service and eliminate competition among associations, are rightly subject to antitrust scrutiny and condemnation. Price fixing agreements attendant to such schemes plainly merit *per se* treatment. But where a service or program jointly offered by several associations does not simply reproduce those previously available from the associations, but instead involves genuine integrative collaboration to create a new or improved service that neither association did, or could, by itself offer, a restrictive agreement that is an essential part of implementing that new service or program does not, and should not, offend the antitrust laws. *Broadcast Music, Inc. v. CBS, Inc.*, 441 U.S. 1, 23 (1979) ("Joint ventures and other cooperative arrangements are also not usually unlawful, at least not as price-fixing schemes, where the agreement on price is necessary to market the product at all.") Under the *per se* test as applied by the Ninth Circuit, however, both are equally condemned. The point is not, therefore, that joint ventures by local Realtor® associations to offer new or enhanced services to their members should escape *any* antitrust scrutiny. Rather, NAR submits that it is critical for the Court to review the Ninth Circuit's fundamentally flawed decision to apply *per se* treatment to agreements necessary to legitimate cooperative ventures among Realtor® and other associations. Left undisturbed, that holding will have devastating consequences for both the freedom and the willingness of associations to continue to innovate cooperatively to better serve their members and the public.

CONCLUSION

For the foregoing reasons, NAR respectfully urges this Court to grant the Petition for certiorari.

DATED: September 12, 2003

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